may be that the learned Judge had in mind section 157 of the Evidence Ordinance, which is set out here for ease of reference:

*Section 157.*

"In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

This section has been considered on at least two occasions by local Courts, namely in *Rex* v. *Velayuthan*[3] by the Court of Criminal Appeal, Singapore, and recently by Ong J. in *Mohamed Ali* v. *Public Prosecutor*[4] and the corresponding Indian section has been considered by the Courts of that country and judgments of assistance to us are to be found in *Mutukumaraswami Pillai and 7 Others* v. *King-Emperor*[5] and in *Bechu* v. *The King*[6].

Section 157 is clear and unambiguous and there can be no doubt that in the circumstances laid down in that section a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a question of fact and no hard-and-fast rule, capable of mechanical application, can be laid down. While, therefore, the former statement of an accomplice or, as in the present case, of a child is admissible to corroborate his testimony and to indicate consistency the weight to be attached to it must vary with the facts of each case.

And in our view the admissibility of such statements does not affect the long established rule of prudence with regard to the corroboration required of accomplices and young children. We cannot do better than repeat in this respect what Lord Reading said in *Rex* v. *Baskerville.*[7]

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only that the crime has been committed but also that the prisoner committed it. ..... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

The tale which Samuel Hong told his mother, even if this evidence was believed by the jury, was clearly not corroboration of his story by independent testimony tending to connect the accused with the crime and this should have been pointed out to the jury by the learned trial Judge.

For the above reasons we considered that the directions of the learned trial Judge regarding the nature of the corroboration required of Samuel Hong's evidence was inadequate and perhaps misleading. In these circumstances it was not possible for this Court to say that, with a proper direction, the jury must have come to the same conclusion, and we accordingly quashed the conviction and sentence and ordered a re-trial.

*Re-trial ordered.*

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## JUSOH v. PUBLIC PROSECUTOR

**[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) January 8, 1963]**

**[K.L. — F.M. Criminal Appeal No. 43 of 1962]**

*Criminal Procedure — Insanity — Murder — Direction to the jury — Killing without motive — Absence of rebutting medical evidence — Criminal Procedure Code (Cap. 6), s.348.*

*Penal Code, ss.302 and 84 — Murder — Defence of insanity — Direction to jury.*

The appellant was charged and convicted of murder at Kuala Trengganu and sentenced to death. On appeal, it was argued: (1) the learned trial judge misdirected the jury as to the nature of the burden which lay on the defence in the case of insanity, (2) his direction as to the law on the subject was inadequate, and (3) he did not deal with the relevant evidence in such a way as to give the jury a proper comprehension of the defence case.

**Held:** (1) the trial judge's direction to the jury as to the onus of proof complied with the passage set out in *Chia Chan Bah* v. *The King* [3] and could not be said to be wrong;

(2) the combined effect of the somewhat cursory way in which the law was stated to the jury and the way in which the evidence was dealt with was that the defence was not adequately put to the jury;

(3) in view of the way in which the jury were directed, the appellant had been deprived of a chance of being acquitted which he would have had had the jury been adequately directed and accordingly the conviction should be quashed.

Order made under section 348 of Criminal Procedure Code for detention pending the orders of the Sultan of Trengganu.

*Cases referred to:—*

(1) *Azro* v. *Public Prosecutor* [1962] M.L.J. 321.

(2) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337, 339.

(3) *Chia Chan Bah* v. *The King* [1938] M.L.J. 147, 148.

(4) *Rivett* 34 Cr. App. R. 87.

COURT OF APPEAL (CRIMINAL).

*G. T. S. Sidhu* for the appellant.

*Raja Abdul Aziz* (Deputy Public Prosecutor) for the respondent.

**Thomson C.J.:** This appellant was tried at Kuala Trengganu for murder in contravention of section 302 of the Penal Code and on 30th October, 1962, he was convicted and sentenced to death. He appealed against his conviction.

On 4th December we allowed his appeal and set aside his conviction but made a finding that he killed the woman for whose murder he was tried but that at the time he did so, by reason of unsoundness of mind, he was incapable of knowing and did not know that what he was doing was wrong or contrary to law and that otherwise his act would have amounted to murder. We accordingly made an order under section 348 of the Criminal Procedure Code for his detention pending the orders of the Sultan of Trengganu.

At the trial the facts of the case as far as concerned the acts of the appellant were not in any controversy.

About December, 1961, the appellant, an elderly man, came to Kampong Rawa, which was the kampong of his younger half-brother, Ali, who had never seen him before. He stayed at various houses in the kampong and then early in February, 1962, he came to stay at Ali's house where he announced he was going to stay permanently as he had nowhere else to go. He was well received and treated as a member of the family though he did no work. At one time there was some discussion as to the distribution of his deceased mother's estate from which he had been excluded as at the time of distribution he was thought to be dead. Ali said he was quite prepared to have the estate re-distributed but the appellant said he did not want his share and the subject was not raised again.

Suddenly on the afternoon of 11th March, 1962, the appellant ran amok. There is no other expression to describe his actions. He slashed his sister-in-law, Siah, and her two young children to death with a parang and then killed a man who was a complete stranger to him and inflicted severe injuries on two young men who led the villagers in securing him. On Siah's body alone there were twelve wounds, nine of them of very great severity. A Medical Officer who saw the appellant about two hours after his arrest described him as "in a daze" and "overwhelmed with woe".

On all this the appellant was prosecuted for the murder of Siah.

At the trial there was no question as to the killing of Siah which was proved up to the hilt and was not in any way denied. Indeed the appellant himself neither gave evidence nor made a statement but remained silent throughout. The only defence raised on his behalf was that of insanity.

That defence was based partly on the admitted facts as to circumstances of the killings, their atrocity and the lack of any motive for them, on the evidence of the Medical Officer who saw the appellant after his arrest and on the evidence of the Assistant Medical Superintendent of the Tampoi Mental Hospital, who had had the appellant under observation for a period of three months after the killing, and who was called as a defence witness.

This witness did not say in terms that he regarded himself as a specialist in mental disease. He had, however, qualified as a medical man in 1938 and had been engaged in clinical work in the Mental Hospital for ten years. His evidence was that on admission to the hospital the appellant was quiet and his memory was good. After about a month he became excited and voluble but not violent. The witness had formed the opinion that at the time of the killing the appellant was suffering from acute mania and in consequence though he knew what he was doing he did not know that what he was doing was wrong. He also thought that the appellant had experienced an irresistible impulse to kill and he said that this was one of the symptoms of acute mania. The witness admitted that his opinion was based on the history of the appellant's behaviour on the day of the killing but of course his opinion by reason of his long professional experience in dealing with persons of afflicted mind even if based on these facts was entitled to respect.

This evidence was clearly not accepted by the prosecution and the witness was cross-examined at length. No medical evidence was called in rebuttal, however, and it is to be assumed that there was no other medical evidence in the possession of the prosecution. If there had been it would have been either called by the prosecution if unfavourable to the appellant or if favourable to him made available to the defence and called by them.

In his summing-up to the jury the trial Judge dealt very briefly with the evidence which went to make out the killing and in effect told them that if they were satisfied as to the truth of the evidence of the prosecution witnesses that evidence made out the offence of murder unless the appellant was entitled to the benefit of his defence of insanity. Before us it was urged that his treatment of this part of the case was unduly cursory but in our view as all this evidence was uncontradicted there was no ground for this complaint.

The Judge then proceeded to discuss the defence of insanity and this part of his summing-up was attacked before us on three main grounds. In the first place it was said he misdirected the jury as to the nature of the burden which lay on the defence in this regard. In the second place it was said that his direction as to the law on the subject was inadequate. And in the third place it was said that he did not deal with the relevant evidence in such a way as to give the jury a proper comprehension of the defence case.

The first of these complaints, in our view, was not well grounded. What the Judge said was this:—

"The defence is one of insanity. Now the onus of establishing it lies upon the accused but the burden of proof which rests upon the accused to establish this defence is not as heavy as that which rests upon the prosecution to prove the facts which they have to establish and this burden may be discharged by evidence

satisfying you of the probability of that which the accused is called on to establish and here the probability that the accused was of unsound mind when he committed this act."

At a later stage he said:—

"If you think there is a probability that he was of unsound mind when he committed the act then you should bring in a verdict that the accused did commit the act but at the time of the commission of the act he was of unsound mind, in other words he did not know what he did was wrong."

This Court has always taken the view that insanity is to be treated on a somewhat different footing from the other "General Exceptions" contained in Chapter IV of the Penal Code (see *Azro* v. *Public Prosecutor*; [1] *Looi Wooi Saik* v. *Public Prosecutor* [2]) and that the onus of proof is correctly set out in the following passage of the judgment of Sir Percy McElwaine in the case of *Chia Chan Bah* v. *The King* [3]:—

"Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed upon him by section 106 of the Evidence Ordinance, but the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It is sufficient if he tips the scale of probability in his favour — if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubts whether he really was insane. As it is put in *Rex* v. *Sodeman* [1936] 2 All England Reports, 1138 the onus on an accused in setting up such an exception as insanity is no higher than the onus on a plaintiff or defendant in a Civil Suit."

We do not think that we are called on to reconsider that view in the present case and on it it cannot be said that the trial Judge's direction to the jury on the point was wrong.

As regards the law relating to the defence of insanity the Judge's direction to the jury was perhaps not as clear and explicit as it might have been. He did not tell them in terms that "nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law" (Penal Code, section 84). He did, however, use words that should have conveyed to them that the defence was made out if they thought that at the time of the killing the appellant was of unsound mind and as a result did not know that what he was doing was wrong and we are not prepared to say that in the circumstances of the case that would have been insufficient if the evidence had been discussed in a different way.

As has been said, in the early portion of his summing-up the Judge did not discuss at any great length the evidence which made out the killing of the deceased woman. When, however, he came to the evidence of the medical witness he dealt with it in considerable detail. He emphasised that the witness did not think that the appellant was suffering from mania during the period he was under observation and that he based his opinion as to the appellant's mental condition at the time of the killing on what he had been told as to what happened then. He did mention that the appellant had killed four people, that the dead woman had multiple injuries and that the appellant had tried to attack other people but at no time did he point out that there was a complete lack of any evidence of any motive for the killings, that three of the dead people, including a baby at the breast, were members of a family in which he had been living as a member on terms of complete amity and that the fourth dead person was a complete stranger. He did not remind them that the medical witness had had considerable experience in connection with diseases of the mind. He concluded his discussion with the following words:—

"You have studied the accused for two days; you are from this country; you are in a better position to judge that man than anybody else and therefore you should consider first whether on the evidence before you and on the evidence of the Superintendent that the accused was in fact suffering from a mental disease when he committed this act."

In view of the fact that the appellant had not opened his mouth throughout the trial it is a little difficult to see what is meant by the jury having "studied him".

In our view the combined effect of the somewhat cursory way in which the law was stated to the jury and the way in which the evidence was dealt with was that the defence was not adequately put to the jury.

It is, of course, well settled that the question of whether the defence of insanity is made out or not is a question for the jury (see, for example *Rivett* [4]) though we know of no case, neither have we read of one, where the only medical evidence has been in favour of insanity and where a jury has been virtually invited to find against insanity on the facts of the case. Generally there is medical evidence on both sides and the jury have to decide on a consideration of the evidence as a whole which body of medical evidence they will accept.

In the present case the prosecution had no medical evidence to rebut the defence evidence but invited the jury to take the view that that evidence did not make out the defence of insanity. In the circumstances it was for the Judge to see that the jury fully appreciated what the defence case really was.

The defence case was that there were four killings in circumstances of very great atrocity for which there was no motive at all, in short that the facts were such that an ordinary man might well be prompted to say "this is the work of a madman", that the uncontradicted evidence of a medical man with long experience in diseases of the mind who had had the appellant under observation for about three months was that at the time of the killings the accused was suffering from mania which would produce in him an irresistible impulse to do what he did, and that although irresistible impulse is no defence, the type of mania from which it springs generally produces the consequence that the sufferer does not know what he is doing is wrong. If the defence had been put to the jury in that way and if they then did not think that insanity was made out in terms of section 84 of the Penal Code the appellant would have had no ground of complaint.

But they were not directed in that way. There was no mention of the circumstance that the killings were apparently without motive, there was no mention of the complete absence of rebutting medical evidence. They were not invited to consider the question of whether on studying the story of the appellant's acts they did not think that that story lent support to the medical evidence. They were only told that "being from this country" (the suggestion clearly being that the medical witness was not from this country although he had had long experience in it) and having "studied" the appellant for two days they were in a better position to judge as to the appellant's mental condition at the time of the killing than anybody else including the medical witness who had had him under observation for three months.

In the circumstances we were compelled to the conclusion that the appellant had been deprived of a chance of being acquitted which he would have had had the jury been adequately directed and we accordingly quashed the conviction.

That led us to consider what course we should take. We were of the opinion that a retrial would serve little useful purpose as on the evidence and bearing in mind the nature of the burden of proof that lay on the defence there could be little doubt as to the course the jury would have taken if adequately directed. We accordingly dealt with the case on the basis that the defence was made out.

*Appeal allowed.*

Solicitors: *Murphy & Dunbar.*

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## OOI YORK CHOO v. LIM SONG FOUNDRY

**[O.C.J. (Hepworth J.) January 11, 1963]**

**[Penang — Civil Suit No. 259 of 1961]**

*Trespass — Licensee of accretion land trespassing on adjacent land — Condition in licence that licensee obtain permission from adjacent landowner — Permission not obtained — Whether adjacent landowner entitled to damages.*

*Land Laws — Trespass to land — Intentional interference — Damages — General or exceptional — Exemplary damages.*

*Damages — Trespass to land — Behaviour amounting to "contumelious disregard" of landowner's rights — Exemplary damages.*

The plaintiff was the owner of a piece of land adjacent to the sea. Between the plaintiff's land and the sea there was a strip of accretion land about 100 feet by 100 feet belonging to the State. The defendants (who were contractors and boat builders) were the licensees of this accretion land and the conditions of the licence were that (a) the licensee should keep the land clean and that nothing permanent should be erected on it, and (b) the licensee should seek permission for his own access to the land. The plaintiff now sued the defendants for trespass for using the plaintiff's land as a means of access to and from the accretion land, for erecting a temporary shed and for knocking down a lavatory on the plaintiff's land.

**Held:** the defendants commenced to use the accretion land on or about October 10, 1961, and they for the purposes of using the accretion land used the plaintiff's land as a means of access with effect from that date. Further at no time prior to October 19, 1961 did the defendants make any attempt to obtain the plaintiff's permission. Thus the defendants trespassed on the plaintiff's land continuously from about October 10, 1961 to about October 20, 1961;

(2) the defendants' behaviour amounted to a wanton intentional interference and a "contumelious disregard of the plaintiff's rights". The plaintiff was entitled to exemplary damages of $3,500 and costs.

CIVIL SUIT.

*Jag-Jit Singh* for the plaintiff.

*Lim Cheng Poh* for the defendants.

*Cur. Adv. Vult.*

**Hepworth J.:** The plaintiff is the owner of a piece of land known as Lot 662, Mukim 14, Province Wellesley North. The defendants are contractors and boat builders and have their place of business at 2698, Bagan Luar Road, Butterworth, Province Wellesley. The plaintiff's claim is for damages for trespass by the defendants on the said land, Lot 662. (A prayer for an injunction was abandoned as now being unnecessary).

Lot 662, which has an area of over 4 acres, is adjacent to the sea. Between Lot 662 and the sea-shore there is an area approximately 100 feet long by 100 feet wide of what is known as accretion land, that is to say land which was formerly covered by the sea. It is common ground that this accretion land is State land.

On the 7th October, 1961, the defendants applied to the Collector of Land Revenue, Butterworth, for permission to erect a temporary shed and to construct tongkangs on this accretion land. On the 10th October, 1961, the Deputy Collector of Land Revenue, Butterworth, replied to the defendants informing them that their application was approved, subject to two conditions, (a) that the licensee should keep the land clean and that nothing permanent should be erected on it, and (b) that the licensee should seek permission for his own access to the land.

It was the plaintiff's case that the defendants had trespassed on the said Lot 662 in three ways:—

(1) By using the said land as a means of access for the purpose of getting to and from the accretion land;

(2) by erecting the temporary shed on the plaintiff's land and not on the accretion land; and

(3) by knocking down a lavatory which had been on the plaintiff's land and building a new lavatory a short distance away.

The defendants denied that they had ever trespassed on any of the plaintiff's land, saying that the temporary structure and the lavatory were built on the accretion land and that the vehicles had obtained access to the accretion land on a route other than the one which ran through the plaintiff's land.

There was some doubt as to the exact location of the temporary structure and the